

Regulation of Monopolistic Cartelization**

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The scope of efforts by the United States Government to maintain competition has been substantially broadened during the last fifteen years. Although the Sherman Act expressed governmental policy since 1890, this policy was thought, during more than 40 years, to be applicable in domestic law enforcement rather than in foreign policy. The antitrust laws were enforced in the domestic market with varying but, on the whole, growing success, but they could not be enforced overseas and the encouragement of competition outside our borders was not considered a diplomatic objective. Relatively unsuccessful efforts were made to enforce the antitrust laws against monopolies that controlled significant imports. Beginning in 1918, exports were exempted from the antitrust laws provided the restrictions imposed upon foreign sales did not also restrict the domestic market or coerce independent exporters. Most Americans presumed that other governments were not concerned with problems of monopoly, that the United States constituted a competitive enclave in a monopolistic world, and that the difficulties which arose in international trade from the contact of the competitive principle with the monopolistic principle were to be dealt with solely by efforts to make existing law effective within our own jurisdiction.

Since the war, the United States has followed a different policy. This policy rests upon the presumption that the governments of countries in which there is private enterprise have a common interest in curbing many monopolistic practices and that the interest of the United States is served by encouraging other countries to adopt policies expressing that interest. Accordingly, the United States Government has tried to develop procedures for joint action with other governments about monopoly problems. Declarations of policy and pledges of action with reference to such problems have become common in international understandings about trade, international loans, and international grants of assistance. Efforts have been made to encourage the enactment of antimonopoly legislation in other countries and to devise an international organization against restrictive business practices.

Missionary enthusiasm has had little to do with this change. Indeed, many of those who developed and applied the new policy did so reluctantly, suspecting that misplaced zeal accounted for the proposals which were brought to them and in turn being suspected

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of misplaced zeal after they adhered to these proposals. The change of policy was probably retarded by a wide-spread feeling among government officials that foreign governments could not be expected to take monopoly problems seriously and that American attitudes toward monopoly were inconsistent with the traditions and systems of law of foreign countries. Such doubts were overcome partly by specific instances in which monopolistic conditions overseas were harmful to American interests and partly by reiterated discovery that foreign governments were more frequently concerned about monopoly problems than had been anticipated.

A major influence in arousing American interest in monopolistic conditions abroad was the fact that early in the war the investigations of Congressional committees and of the Department of Justice established a close relationship between certain international cartels and the economic objectives of totalitarian states. In Germany and Japan, and to a lesser extent in Italy, private business had been brought so far under government control that when great business enterprises participated in international business negotiations they often did so for political objectives as well as for their own business purposes. In non-totalitarian countries, business interests were seldom coordinated with the political interests of governments. When cartel arrangements were made between the business enterprises of the democracies and those of the totalitarian states, the resulting restrictions often served a totalitarian political purpose as well as a monopolistic business purpose. Thus in particular instances, restrictions were imposed upon the productive capacity, technological development, or current production of strategic industries in democratic states without equivalent restrictions in totalitarian states; markets for strategic equipment were allocated in such a way that democratic states were made dependent upon supplies flowing from totalitarian states; a one-way flow of technological information was established from the business enterprises of democratic states to those of totalitarian states, in extreme cases associated with a flow of military secrets; trade was associated with totalitarian political propaganda and used to reward the political friends of totalitarianism or to discipline its political enemies; and properties belonging to the business enterprises of totalitarian states and markets allocated to them were protected from wartime loss by a false cloak of ownership or by a temporary transfer to cartel partners in other countries. Moreover, after war broke out, the continued alliance of business enterprises on both sides of the battle lines with cartel partners in neutral countries created dangerous possibilities of a flow of restricted information to enemy enterprises. As these patterns became clear, there was a tendency to exaggerate them, particularly by

attributing to cartelization effects that were inherent in the fact that the larger business enterprises of the totalitarian states had overseas branches and conducted overseas trade. Apart from such exaggerations, however, it was evident that various business enterprises in the democracies had failed to see the political implications of cartel arrangements or had acquiesced in them, and that because these enterprises had based their trade policy upon cartelization they could not adapt themselves to the political needs of belligerency without substantial embarrassment.

Although such political and strategic problems were important in creating a wide-spread interest in international aspects of monopoly, they lost their central position soon after the close of hostilities. The fact that post-war imperialism has been communistic has prevented the use of international cartels as instruments of imperialistic political sabotage or penetration since the war. The concern which was felt at the war's end lest international cartelization become a means to the re-establishment of German or Japanese imperialism has diminished greatly — in each case, largely because of new political alignments. If policy toward cartels were solely a matter of their military significance, the United States probably would be little concerned today with such policy.

But the United States is interested in overseas aspects of the monopoly problem because they are also closely related to the economics of reconstruction in Europe and Asia and to the long-run economic objectives of our foreign policy. The significance of monopoly for foreign policy has become evident in relation to three sets of objectives.

The first is the establishment of levels of productivity and trade sufficient to make war-shattered countries self-sustaining. The interest of the United States in restoring productivity arises, in part, from the close relation between our own prosperity and stability and the prosperity and stability of other countries with which we maintain economic intercourse. In a narrower sense, it springs from the fact that until normal production and normal trade are restored we carry a direct burden of foreign assistance in the form of grants or loans.

The effect of various cartel restrictions overseas has been to retard recovery and limit productivity. In a cartel which fixes prices, for example, the tendency is to satisfy all the participants by setting the price high enough to provide a profit even for the least efficient in the industry. The result is to keep inefficient concerns alive and to prevent the expansion of consumption which might take place at lower prices. This type of scheme is frequently accompanied by an allocation of markets or a restriction of output, which further protects the inefficient concerns by preventing the

most efficient from increasing their productive capacity and their volume of sale as they might otherwise be tempted to do by their high profits. In some cases, such burdens upon productivity are associated with agreements designed to prevent introduction of new technological processes and erection of new capacity so long as such changes would jeopardize the value of existing investments. In an economy that carries burdens such as these, the restoration of satisfactory levels of production, employment, and trade is unnecessarily difficult.

The second objective is the fostering of multilateral international trade, relatively free from trade barriers. For this purpose, the United States has sought for 20 years to negotiate reciprocal reductions of tariffs on a mutually advantageous basis and to promote the elimination of a wide variety of quantitative restrictions on trade imposed by governments. Such a policy can be defeated, however, by the private activity of international cartels. One of the most common patterns of international restriction imposed by cartels is the allocation of national markets to particular business enterprises. In such a scheme, great international concerns agree not to invade one another's home markets and to divide the markets of other countries among themselves. If all significant producers are parties to the agreement, the effect may be the equivalent of a series of governmental trade embargoes. In particular instances, such a system of market sharing may divide one or more national markets among claimant enterprises on a percentage basis or in terms of fixed quantitative limits. Such arrangements are the exact equivalent of governmental quantitative restrictions. To eliminate governmental trade barriers while permitting trade barriers established privately is to dispense with whatever protection may be afforded for the public interest by the use of governmental processes, and to make it certain that systems of trade barriers will protect private interests only where private concerns are few enough and powerful enough to develop international private arrangements for such purposes.

So far as the domestic market of the United States is concerned, enforcement of the antitrust laws may in most cases prevent a governmental policy of liberalizing trade from being nullified by private action. However, the antitrust laws do not cover the allocation of export markets nor the establishment of systems of private trade barriers among foreign countries. In Europe, particularly, the autarchical policies of cartels provide a strong reinforcement for tariffs and quantitative restrictions in preventing the creation of a single European market and in thereby limiting the scale of production and thwarting efforts to locate industry where it can produce most efficiently. These matters are important to the United

States in proportion as the economic unity and prosperity of Europe are important to us.

The third objective is to raise standards of living and well-being. Our humanitarian desire that the people of the world shall be well-nourished and comfortable has been reinforced by a growing awareness that internal political disorder and susceptibility to subversion from abroad are closely associated with malnutrition and low standards of living and even more closely associated with a belief that there is no reasonable ground for hope that living conditions will improve. Moreover, we have begun to apply to international trade our domestic conviction that prosperous customers are the best guarantee of profitable commerce. The belief that the United States has an interest, economic and political, in a rising standard of living throughout the world has been expressed in programs of action such as the provision of technological assistance directly through the Point IV program and indirectly through the United Nations. It is evident, however, that where cartels restrict output, retard technological change, and charge high prices, the impact of private cartel policy runs directly counter to the improvement of standards of living. If the affirmative programs are worth pursuing, business policies that point in the opposite direction are worth curbing.

Cartels are sometimes defended, particularly in Europe, on the ground that they may contribute to the maintenance of standards of living. While it is usually admitted that the policies of cartels look toward price maintenance, market sharing, limitation of output, and the establishment of trade barriers, it is argued that many cartels pursue such policies only within reasonable limits and that they do so largely to protect the stability of business operations and thereby the employment of labor and the maintenance of the standard of living of those employed. If there is some sacrifice of productivity and progress, the argument runs, the loss is more than offset by the gain in security. Most governments have accepted this kind of argument from time to time as a justification for governmental programs of price maintenance or market protection. In this country, for example, the operations of the Bituminous Coal Commission were based upon such a view, and some of our farm programs are still so based. However, even those who give greatest weight to such considerations must recognize that when the door is opened for private restrictive arrangements the restrictions will not be adopted solely when they can be justified on such grounds, and even those restrictions that might be justified will not be limited in scope and duration as would be desirable on such grounds. Accordingly, the argument for stability through reasonable restriction constitutes, at most, a warn-

ing that exceptions may need to be made in the general attack upon international cartels—that just as legislative exceptions are made in our own domestic policy, there may be need for administrative exceptions in our foreign policy.

Concern over the relation of cartels to recovery and productivity, to multilateral trade, and to rising standards of living has increased during the postwar period because American funds and American initiative appeared to be necessary to restore production in Europe and to revive world trade, and also because the foreign policy of imperialist Communism seeks to exploit whatever social unrest may be created by low standards of living, restricted productivity, and lack of economic cohesion among the nations of the free world. But for these special influences, it is doubtful that the cartel aspects of foreign policy would have been perceived so quickly. In the long-run, however, they probably would have emerged; for as the improvement of transportation and communication brings the world closer together and as foreign trading enterprises develop complex corporate structures which control significant segments of international trade, the distinction between domestic trade and foreign trade must necessarily have become less, and discrepancies in the policies of the principal trading countries must necessarily have given rise to greater problems.

Alongside the development of the cartel aspects of American foreign policy, there has been a considerable growth in the proportion of enforcement activity under the antitrust laws which is devoted to international arrangements. Attacks upon international restrictive schemes have become common now that the character and prevalence of such arrangements is better known. With this increase in the importance of cartel cases under the antitrust laws has come a growing awareness that there are major difficulties in applying our domestic law effectively to restrictive practices that are international in character. Thus the interest in cartels as an aspect of foreign policy has been reinforced by a belief that some of our domestic monopoly problems cannot be satisfactorily solved under domestic law unless our own governmental proceedings are supplemented by appropriate action on the part of foreign governments.

The difficulties that arise when the antitrust laws are applied to an international cartel are greatest when corporations are subject to the law and policy of one or more other countries which tolerate or approve the restrictions attacked by the United States. In cases in which American enterprises participate in international cartels as exporters, the export markets may lie in countries which allow cartels to engage freely in private disciplinary practices. Under these circumstances, an American enterprise not partici-

pating in a cartel may be handicapped by concerted activities designed to exclude it from the market. For example, the cartel members may collectively refuse to deal with distributors who purchase the products of the American independent. There are even occasional instances in which the cartel is fostered by the government of the country in which it operates, so that legal barriers are interposed to handicap the trade of independent concerns. Circumstances such as these were influential in bringing about the adoption of the Webb-Pomerene Act. But in permitting American exporters to act concertedly in foreign markets, that statute does not cope directly with the problem to which it is applied. If the exporters are powerful, they may take the lead in foreign restrictions. If they are weak, their joint action may be insufficient to remove the barriers to their entry into foreign markets. In either case, the effect of the remedy is to authorize offensive or retaliatory restrictions, not to create a more competitive situation.

In some instances, American companies enter foreign cartelized markets by coming to terms with the cartel. If, in doing so, they make themselves the instrument of the cartel in restricting the trade of independent American exporters, they violate the law of the United States. If the arrangement includes an undertaking by the foreign members of the cartel to restrict their shipments to the United States, there is also a violation of American law. If, however, the arrangement does not affect exporters who are not participants therein and if it is concerned solely with overseas markets, it is immune under our statutes. There have been repeated instances of attempts to conceal the portions of such an international arrangement which pertain to the American market in order to enjoy the benefits of such immunity.

A problem may also appear when the cartel consists of foreign producers who control international trade in a commodity imported into the United States. Since the restrictions of such a cartel directly affect the United States, their illegality is comparable to that of a purely domestic arrangement. However, it is relatively easy to organize such a cartel so that the members thereof do not come within our jurisdiction and their activities in fixing prices, limiting shipments to this country, or allocating this country's market to certain of their members are carried on entirely in countries which do not condemn such activities. By selling their products to nonparticipants before it becomes a part of American commerce, they can avoid the application of American law.

Monopolistic restrictions upon our imports have aroused especial concern in the case of natural rubber, quinine, nitrates, coffee, industrial diamonds, and potash. In the case of natural rubber, a plan of cartel control supported by foreign governments

during the early 1920's tripled the price at a time when most of the world's rubber supply was being purchased by the American automobile industry. Defensive programs for use of reclaimed rubber and for the establishment of American rubber plantations overseas were sponsored by the United States Government, and the Congress seriously debated a proposal that American importers be allowed to organize buying monopolies in self-defense. In the case of nitrates, there was intensive protest by fertilizer users, and serious consideration was given after the First World War to federal subsidy of synthetic production to break the cartel. In the cases of coffee and potash, restrictive programs on behalf of cartelized foreign producers were given effect through sales agencies serving the American market, until prosecution forced the termination of these agreements. But thereafter the old control was continued in a form in which the cartelized producers sold the product to American purchasers before its importation into this country and thereby escaped the jurisdiction of the American courts. In the case of quinine, cartel control was used not only to keep the price high but also to restrict the importation of cinchona bark into the United States and thus to insure that most of the manufacture would take place overseas.

The Second World War underlined the importance of such foreign cartels in the cases of quinine, rubber, and industrial diamonds. The restrictive programs for the control of both rubber and quinine were maintained in spite of the developing emergency, and there was reluctance to build up substantial stockpiles of either product beyond the cartel's control for fear that the cartel's power might be thus broken. Before this reluctance was overcome, the producing areas were over-run by the enemy, and, in consequence, the United States entered the war with a protective stockpile much smaller than might otherwise have been accumulated. In the case of industrial diamonds, the need for a stockpile on the North American Continent became evident, but the cartel was so reluctant to relinquish control that it was impossible to create that stockpile in the United States, where the war plants using industrial diamonds were concentrated. Instead, a compromise was negotiated under which the cartel established a stockpile under its own control in Canada, and thus minimized the risk that its control might be broken. An eventual antitrust proceeding against the diamond syndicate¹ was grounded upon the fortuitous circumstance that one or two small shipments of diamonds had been found in this country under cartel control, but the court held that this was too slender a basis upon which to assert the jurisdiction of the Ameri-

¹ *U.S. v. DeBeers Consolidated Mines*. CCH TRADE CASES para. 62, 248 (1948-49).

can courts; and had this ruling not been made, the syndicate certainly would not have allowed itself to stray under American jurisdiction a second time.

Procedural difficulties may appear in antitrust cases even though some or all of the participants in a restrictive arrangement are to be found within the jurisdiction of the United States and the arrangement itself violates American law. The international character of the scheme may create problems of proof and jurisdiction and problems in devising an appropriate remedy.

The problems of proof arise because in an international undertaking it is possible to hold meetings and keep records in whatever country is convenient, particularly if the participants are corporate enterprises domiciled in more than one country. Since the laws of the United States are more severe and the investigatory powers of the United States more extensive than in most countries, it is often an obvious precaution to hold cartel meetings abroad and to skeletonize the records of cartel activities that are kept in this country. When an American corporation has subsidiaries overseas, it is sometimes convenient for a foreign subsidiary to participate in the cartel while the American parent stands aloof, and it sometimes follows that the activities of the American parent are consistent with the cartel agreement though there is no evidence of direct adherence to the agreement. In such a pattern, circumstantial evidence from corporate structure and behavior may be the sole way to prove the responsibility of the parent; and the difficulty of such proof may be enhanced by the fact that the officials and records of the subsidiary are not within reach. Moreover, if the cartel arrangement consists of an allocation of markets or an assignment of export quotas, an exhaustive survey of the activities of the parent company may be necessary in order to prove by circumstantial evidence alone that its exporting practices conform to the cartel agreement. Yet there are formidable difficulties in obtaining access to cartel records located abroad.

The difficulty of obtaining evidence with reference to an international arrangement is illustrated by the problems that confronted a grand jury investigating an alleged international petroleum cartel in 1952.² An effort was made to subpoena the records of international oil companies which were thought to be relevant to the charge that there was a world-wide agreement to limit crude oil production, to allocate business in refined products, and to fix prices. Many of the records which were called for were physically located beyond the boundaries of the United States. In certain instances, there were legal requirements that particular classes of records

² *The Economist*, August 30, 1952, and *The Washington Post*, November 18, 1952, p. 35.

must be kept within a particular country. The governments of two foreign countries served notice upon the oil companies they would not be permitted to comply with the American subpoena in cases in which production of the documents called for would be regarded as inconsistent with the national interests of the countries in question. Even in the absence of such formal obstacles, there are obvious difficulties in making sure that compliance with such a subpoena has been complete.

The problems of jurisdiction are closely related to those of evidence. Foreign subsidiaries and their officials are not directly within the reach of American law. To proceed against the parent company and its officials for the acts of subsidiaries may be difficult; for such a proceeding can be successful only if the chain of responsibility can be clearly demonstrated. If subsidiaries are allowed considerable discretion, this fact weakens the chain. If control is exercised through a block of stock constituting less than an absolute majority of the voting shares, or through other devices which leave the fact of control open to dispute, the existence of the chain may be difficult to demonstrate. If the American company is itself the subsidiary and the overseas corporation the parent, there may be a practical impossibility in proceeding against the subordinate on the theory that it is responsible for acts over which it apparently had no control. The possibilities of devising complex corporate structures are numerous, and when the corporate parts thereof lie in different countries, subject to the vagaries of several different kinds of corporation law, the possibilities of concealing portions of the structure are also numerous. The courts of a single country are by no means sure of achieving effective jurisdiction over a business entity even though it does business regularly within the country's borders.

An illustration of such jurisdictional difficulties is the first potash case³ instituted by the Department of Justice in 1927. That restrictions were being imposed upon the sale of imported potash in this country was not in dispute. Nevertheless, the Attorney General found it necessary to accept a consent decree which enjoined the illegal acts if they were performed in this country but recognized the right of the defendants to continue the same restrictions provided they undertook them overseas and disposed of the product before it entered American commerce.

When the problems of proof and jurisdiction have been successfully met, difficulties may arise in devising a satisfactory remedy. In some cases, the steps which an American court thinks necessary in breaking up a cartel are inconsistent with the legal obligations of the defendant in a foreign jurisdiction. Thus an

³ U.S. v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929).

American court may set aside a cartel contract as contrary to public policy but a foreign court may entertain a suit for breach of that contract and may award damages to foreign companies that have suffered from the failure to live up to the cartel agreement and that are not themselves subject to the American court's order. In particular instances, a foreign court may order performance of the contract and thus expose the defendant in the American case to judicial penalties overseas if he complies with the order of the American court.

An example of the ineffectiveness of a court decree, where acts in other countries are involved, is to be found in the recent case against Imperial Chemical Industries and duPont.⁴ These two companies were found guilty of a world-wide conspiracy to allocate markets by interchanging patent rights. A part of the conspiracy had been to give Imperial Chemical Industries a monopoly of the products of both companies in the market of the United Kingdom and to give duPont a corresponding monopoly in the United States. During the pendency of the cases, the very valuable British patents for nylon, which had been exclusively licensed by duPont to Imperial Chemical Industries, were transferred to the ownership of Imperial Chemical Industries. The American court found that this transfer had been made for the specific purpose of evading the jurisdiction of the court. Accordingly, it ordered Imperial Chemical Industries to return the patents to duPont and ordered duPont to make them generally available by license on non-discriminatory terms. Meanwhile, however, Imperial Chemical Industries had given an exclusive United Kingdom license to another British company, British Nylon Spinners, Ltd., 50 percent of whose stock is owned by Imperial Chemical Industries. British Nylon Spinners sued in a British court to enjoin Imperial Chemical Industries from complying with the order of the American court on the ground that compliance would invalidate the exclusive license held by British Nylon Spinners and would thus wrongfully deprive a bystander of valuable property interests. The British court provisionally sustained the contention by granting a temporary injunction. The matter now awaits final adjudication.

Another illustration has appeared in the case against the incandescent lamp cartel.⁵ The American courts have found that this cartel was organized primarily for the purpose of assuring a monopoly of the North American market for incandescent lamps by General Electric and Westinghouse, and that the operations of the cartel included a great variety of restrictive practices, one of which

⁴ U.S. v. I.C.I., et al, 105 F.Supp. 215 (1953).

⁵ U.S. v. General Electric Co. 82 F. Supp. 753 (D.N.J. 1949). Final judgment entered October 2, 1953, CCH 1953 Trade cases, para. 67, 576.

was the establishment of a system of exclusive patent licenses designed to allocate the world market. Some of the European participants in the scheme were beyond the jurisdiction of the American court. One, however, N. V. Philips, had a branch doing business in the United States. A part of the relief granted by the American court consisted in a requirement that Philips must license its American patents to independent interests as well as to General Electric and Westinghouse. But the inventions which are subject to the American patents are also subject to patents in other countries. Hence the court feared that an American independent producer, operating under a license for a United States patent granted in accord with the court's order, might be unable to export to Europe because Philips would be able to bring suit on a charge that the corresponding patents in European countries were infringed when the lamps were sold there. To make possible the participation of American independent companies in export trade, the court required Philips to grant its American licensees immunity from suit under the corresponding foreign patents so far as shipments from the United States were concerned. The decree made no attempt to require Philips to license American or other companies to produce in Europe under the Philips' patents. The Dutch government officially protested the court decree on the ground that it constitutes an effort to control the activity of a Dutch corporation in Holland with reference to the use there of patents issued by the Dutch government.

Such difficulties are enhanced in cases in which an international restrictive arrangement has been adroitly divided into parts, so that its full character and significance do not appear in the portion that comes within the jurisdiction of the courts of particular countries. For example, a restrictive cartel agreement may be supplemented by an agreement among the cartel members to arbitrate all commercial disputes. This arbitral agreement may be worked out under the laws of a country such as Switzerland, which is hospitable to commercial arbitration, and may be reinforced by the deposit of funds in Swiss banks to guarantee the payment of arbitral awards. When a breach of the cartel agreement is brought before such a Swiss court, there is no need to introduce the substance of the arrangement. All that is necessary is to prove that there was a commercial dispute, that there was an agreement to arbitrate, and that the arbiter selected by the parties has rendered an award. Thereupon the Swiss courts will enforce the award by a levy upon the funds deposited for this purpose. Obviously it would be difficult for the order of an American court to upset such a scheme.

The weakness of the remedies available to a single country appears most clearly in the type of cartel arrangement which is

most common — that is, the allocation of world markets through an agreement made effective by the interchange of patent rights. A patent cartel takes advantage of the fact that a series of national patents may be issued upon a single invention, each patent being good only within the jurisdiction of the issuing country. When patents are used to allocate markets, all of the relevant patents possessed by all of the participating companies are assigned or exclusively licensed in each country to the enterprise to which that country's market has been allocated. Possessing in his own country all of the patents available to the cartel, a cartel member has a patent position in that country much stronger than he could attain through his own patents alone. He can use patent litigation to enforce his claims to the market not only against the other members of the cartel but also against nonparticipants. If the patents are strong, the system of market allocation is likely to be invulnerable so long as the patent rights endure. When an American court undertakes to break up such a scheme, an order which merely prevents the future assignment or cross-licensing of patents in accord with the scheme would be ineffective. During the life of the existing patents, a continued enforcement of the patent rights of the cartel members would be sufficient to continue the market allocation in fact even though it might have been abandoned in form. Consequently a divestiture of patents or a general licensing thereof becomes necessary if the momentum of the cartel arrangement is to be terminated. If, however, an American court orders cartel members controlling the American market to license their American patents generally, the effect is to open the American market to new competition but not to permit the American companies to sell in overseas markets. Both the American participants in the cartel and the new licensees will find themselves subject to patent litigation in foreign countries if they seek to export, and the patents used against them abroad will be the counterparts of the patents thrown open in the United States. American courts have recently sought to minimize such effects by ordering cartel members who sell in the American market not only to license their American patents but also to license correlative patents which they hold abroad or, failing that, to grant American licensees immunity from suit under these foreign patents. In any case in which there are participants in the cartel who have not come under the jurisdiction of the American courts, this kind of order can be only partly effective. Moreover, as is evident in the case against Imperial Chemical Industries and duPont, mentioned above, the effect may be further reduced by the action of foreign courts, which may assert their jurisdiction over the patents issued in their own countries and may refuse to allow a structure of patent rights to be altered adversely

to the interests of their own nationals pursuant to an order by an American court.

The domestic antitrust laws of the United States have often been effective even when applied to international problems. Whenever a cartel arrangement can be effective only provided American business enterprises collaborate in it, and wherever the arrangement illegally restrains the commerce of the United States, including its exports or its imports, the American law can be invoked against the American participants in the scheme, including the American branches of foreign participants, and success in eliminating them from the cartel is sufficient to destroy the effectiveness of the entire arrangement. Thus, for example, a successful prosecution of American members of an alkali cartel⁶ was apparently sufficient to break the program of the cartel in the Brazilian and Argentinian markets. However, when a cartel restricts American commerce without the participation of enterprises under American jurisdiction, American law can do nothing. Moreover, American officials are handicapped in obtaining evidence if the operations of the cartel are carried on beyond our boundaries and if the records are kept there. In some instances, too, the effective destruction of a cartel arrangement requires coordinated action reaching beyond United States territory, and the inability of the American courts to control fully acts of American companies outside the United States limits the effectiveness of the remedy. These problems are at their maximum where there is a conflict between American law and foreign law, so that business enterprises are subject to contradictory requirements.

With these two incentives for action — the growing significance of cartels in American foreign policy and the developing problems which international cartels create for domestic law enforcement — the United States began during the war and has continued since to seek an understanding with other countries about the cartel problem. Study of the possibilities of international action with reference to cartels was included during the latter stages of the war in the plans that were then being formulated for a comprehensive postwar agreement on international economic affairs. In the early stages of these studies, cartelization was treated as one among a considerable number of trade barriers, public and private. In 1942, a broad reference to trade barriers was incorporated in the master lend lease agreement, to which the various recipients of lend lease aid affixed their signatures. For example, the United States and the United Kingdom agreed in February, 1942, that the eventual settlement of lend lease claims should include

⁶U.S. v. United States Alkali Export Association, Inc., 86 F.Supp. 59 (S.D.N.Y. 1949).

"...provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers; . . ."

In 1943, the Trade Agreements Act of 1934 was amended to include a proviso that the President may suspend the application of the reduced duties to the goods of any country

"...because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes set forth in this section; . . ."

At the close of hostilities, the concern of the United States with cartel policy overseas was further expressed in a program of decartelization included in the policies of the American occupation of both Germany and Japan. In both countries, procedures were adopted to reduce the size and power of the largest business enterprises and to remove the legal basis for monopolistic business agreements, both national and international. In both countries, too, the occupation authorities brought about the enactment of laws intended to curb monopoly and sought to encourage the adoption of an antimonopoly policy not limited to the period of the occupation.

Negotiations to create an international trade organization, with the curbing of cartels as one of its purposes, were undertaken even before hostilities ended. They culminated in 1947-48 in a conference in Havana, attended by representatives of 57 nations. The conference produced a draft charter, which, however, has not been ratified and is no longer under active consideration by governments. This charter undertook to deal comprehensively with problems of employment and labor standards, development and reconstruction, tariffs, preferences, quantitative restrictions, subsidies, state trading, intergovernmental commodity agreements, and restrictive business practices. Its provisions with reference to the latter contained an undertaking by each government to co-

⁷ Article VII, "Agreement between Governments of the United States of America and of the United Kingdom on the Principles Applying to Mutual Aid in the Prosecution of the War Against Aggression, Authorized and Provided for by the Act of March 11, 1941," signed February 23, 1942. 56 STAT. 1433 (1942).

⁸ Section 350 (a) (2), Joint Resolution to Extend the Authority of the President under Section 350 of the Tariff Act of 1930, as amended. 57 STAT. 125 (1943).

operate with the others and with an international organization to prevent business practices affecting international trade "which restrain competition, limit access to markets, or foster monopolistic control, wherever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of"⁹ certain objectives set forth in the charter. This undertaking was to be given effect by procedures for consultation between members, for investigation of complaints, and for the conduct of studies having to do with restrictive practices and related matters. An international organization was to receive complaints, assemble information and analyze it, decide whether harmful effects were present, recommend remedial action if it wished to do so, and report the action taken. The participating countries, however, were to carry out all the investigations and to determine their own course of action in the light of the findings and recommendations of the international body.

The United States did not wait for a comprehensive treatment of cartel problems such as was contemplated by the Havana charter. Instead, it began in 1948 to provide for the treatment of cartel problems in the conduct of its daily international relations. The Economic Cooperation Act of that year was designed to foster recovery through American aid. Under this statute, bilateral agreements were made with various countries. In 26 such agreements, there was a standard provision binding the recipient country to the general principle that had already been set forth in the draft Havana charter. For example, paragraph 3 of Article II of the agreement with Norway, signed in July, 1948, provided that,

"3. The Royal Norwegian Government will take the measures which it deems appropriate, and will cooperate with other participating countries, to prevent, on the part of private or public commercial enterprises, business practices or business arrangements affecting international trade which restrain competition, limit access to markets or foster monopolistic control, whenever such practices or arrangements have the effect of interfering with the achievement of the joint program of European recovery."¹⁰

An annex to this agreement defined the business practices to which the program referred in language which (except for the final subparagraph) was taken directly from the Havana charter, as follows:

"(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

⁹ *Havana Charter for an International Trade Organization*, March 24, 1948, U.S. Department of State. p. 86.

¹⁰ Economic Cooperation Agreement with Norway, signed July 3, 1948. 62 STAT. (2)2514 (1948); T.I.A.S. 1792.

"(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

"(c) discriminating against particular enterprises;

"(d) limiting production or fixing production quotas;

"(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

"(f) extending the use of rights under patents, trade marks or copyrights granted by either country to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants;

"(g) such other practices as the two governments may agree to include."¹¹

In 1950, a program to guarantee investment abroad was undertaken as a part of the recovery effort. In practice, applications for guarantees have been screened in an effort to assure that the proposed investments are consistent with the policy against cartels.

In 1951, in adopting the Mutual Security Act, the Congress included therein the so-called Benton amendment, which declared it to be the policy of Congress that the Act be administered in such a way as

"...to the extent that it is feasible and does not interfere with the achievement of the purposes set forth in this Act, to discourage the cartel and monopolistic business practices prevailing in certain countries receiving aid under this Act which result in restricting production and increasing prices, and to encourage where suitable competition and productivity..."¹²

In the following year, this provision was supplemented by the so-called Moody amendment to the Economic Cooperation Act, which earmarked a substantial portion of the appropriated funds to be expended in furthering the objectives of the Benton amendment. In 1953, the Benton and Moody amendments were both eliminated, but provision was made that commitments and agreements which had been entered into under the Moody amendment would be carried out. In lieu of the Benton amendment, the Congress adopted the so-called Thye amendment, which declared it to be the policy of the United States,

"...to encourage the efforts of other free countries in fostering private initiative and competition, in discouraging monopolistic practices, in improving the technical effici-

¹¹ *Ibid*, paragraph 3 of the Annex.

¹² PUB. L. No. 165, 82nd CONG., 1st SESS. Chapter 479, § 516 (1951). Other provisions of the amendment sought to foster free private enterprise to encourage free labor unions and collective bargaining.

ency of their industry, agriculture, and commerce, and in the strengthening of free labor unions; . . ."¹³

One significant effect of the Benton amendment has been to influence the policies of the United States in off-shore procurement of military supplies. American procurement officers were instructed to buy through channels which minimized the risk that restrictive business practices would inflate prices, hamper delivery, or impede production. They were instructed to negotiate in so far as possible with individual firms rather than trade associations or joint sales offices, to give preference to independent companies without restrictive affiliations, and actively to foster competition among bidders.¹⁴

In 1948, the United States also began to include provisions about monopoly in its treaties of friendship, commerce, and navigation. Thus far such provisions have appeared in treaties with Colombia, Denmark, Greece, Ireland, Israel, Italy, Japan, and Uruguay. Although there are minor variations in wording, the provision in the treaty with Ireland may be regarded as fairly representative. It reads as follows:

"1. The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."¹⁵

In 1948, the President approved a public loan policy for the United States, which had been developed by the National Advisory Council. This policy provided that

"... 'credits should not strengthen or extend business arrangements or practices (whether engaged in by public or private commercial enterprises) affecting international trade which restrain competition, limit access to markets or foster monopolistic controls.' The policy outlined in this document also indicates that the United States will seek to discourage private investments which strengthen international private cartels."¹⁶

¹³ PUB. L. No. 118, 83d CONG., 1st Sess. Chapter 195, § 710 (1953).

¹⁴ *Foreign Legislation Concerning Monopoly and Cartel Practices*, Report of the Department of State to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, July 9, 1952, p. 178.

¹⁵ Article XV, Treaty of Friendship, Commerce and Navigation with Ireland, signed January 21, 1950. 2 U.S.T. 785, T.I.A.S. 2155.

¹⁶ *Foreign Legislation Concerning Monopoly and Cartel Practices*, Report of the Department of State to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, July 9, 1952, p. 177.

In 1949, the Department of State released to the press a formal statement as to United States policy with respect to elimination of cartel and other trade restrictions. It read, in part, as follows:

"One aspect of this Government's foreign economic policy is the elimination of cartel and other private restrictions on the growth of international trade....

"At the present time, we are much concerned that the growth of such private arrangements may hamper the program for European recovery. Our program in Europe seeks to establish a higher standard of living and viability of the European economy. These objectives, we feel, can only be gained by increased efficiency and productivity of European industry, stimulated by the creation of a broader competitive market. They cannot be attained if private restrictive arrangements to fix prices, divide territories of sale or limit production simply replace government barriers such as quotas and tariffs. In addition, cartel arrangements, by preventing sales by European firms to hard currency areas, can interfere with efforts to overcome the dollar deficiencies of the participating countries."¹⁷

In 1951, an executive order was issued,¹⁸ establishing procedures for the procurement of strategic materials for stockpiling in the United States. In the application of this order, procurement officials have, where possible, used or developed sources of supply that are not under cartel control. In many procurement contracts they have included a provision by which

"The contractor covenants that it will not enter into any business arrangements, with private or public commercial enterprises located either in (country) or in any other part of the world, restraining competition in the production and distribution of (material), limiting the access to markets of any enterprise engaged in the production and distribution of (material), or fostering monopolistic control over the production and distribution of (material)."¹⁹

In language borrowed from the Havana charter, this provision then lists the types of arrangements which are to be regarded as covered by the undertaking.

These specific applications of anti-cartel policy have been supplemented by broad efforts to stimulate an interest abroad in the competitive practices of American business and to encourage enactment of antimonopoly laws in foreign countries. The most important aspects of these policies have been described by the Department of State in a report to a Senate Committee as follows:

"Through the technical assistance program of the Mutual Security Agency, the United States has arranged for the visit of many technical experts from European indus-

¹⁷ Department of State Press Release No. 939, Dec. 1, 1949.

¹⁸ EXEC. ORDER No. 10281, 16 FED. REG. 8789 (1951).

¹⁹ E.C.A. Standard Form Exploration Contract No. 2.

try to the United States to provide them with technological information of value in improving the productivity of their industries. MSA's recently inaugurated Production Assistance Drive is an intensified program to demonstrate to European industry the advantages of an expanding economy operated on a competitive basis. The program contemplates that use of counterpart funds and United States technical assistance to stimulate the development in several key participating countries of special programs to increase productivity, to improve business practices, and to provide a share in the resulting benefits among ownership, labor, and consumers.

"The United States has also encouraged the adoption of foreign legislation against restrictive business practices. Our overseas missions have assisted interested foreign governments in the preparation of legislation against restrictive business practices by making available pertinent information. In the case of the United Kingdom, France, and Germany, arrangements were made for teams of experts to visit the United States to study the antitrust laws and their administration."²⁰

Thus United States policy toward cartels since the war has had four aspects. First, an effort has been made to develop a systematic cooperative attack by governments upon the cartel problem. Second, agreements with particular countries have included provisions defining policy toward cartels in broad terms. Third, programs as to loans, technical assistance, and procurement have been administered in an effort to reduce the strength of cartels. Fourth, information services, productivity teams, and diplomatic contacts have been used to encourage the development of anti-monopoly legislation in other countries.

In 1951, with the Havana charter dormant, the United States began a second effort to develop a general program of international cooperation about cartels. Other aspects of the broad program of the Havana charter had become the subject of separate endeavors. Tariffs and quantitative restrictions were being reduced so far as possible under the Trade Agreements Act and through the international secretariat established to give effect to the General Agreement on Tariffs and Trade negotiated in 1947. Economic development was being fostered by the Point IV program and also by the technical assistance program of the United Nations. Efforts were being made to establish an international body for the regulation of intergovernmental commodity agreements through action by the United Nations Economic and Social Council. But subsequent to the drafting of the Havana charter, there had been no similar at-

²⁰ *Foreign Legislation Concerning Monopoly and Cartel Practices*, Report of the Department of State to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, July 9, 1952, pp. 177-8.

tempt to establish a broad international program about monopolies.

At a meeting of the Economic and Social Council at Geneva in 1951, the United States proposed a resolution designed to revive the cartel provisions of the Havana charter. It recommended that governments cooperate against restrictive business practices that had harmful effects, and provided for an ad hoc committee to submit proposals to the Council for methods of implementing this recommendation. Preliminary negotiations indicated that there was a difference of opinion within the Council as to whether any such program should be established within the United Nations or as an adjunct to the General Agreement on Tariffs and Trade. Accordingly, the resolution was expanded to instruct the Secretary-General of the United Nations to seek the views of intergovernmental bodies or agencies as to the organization which could most appropriately undertake the work, and thereafter to make a recommendation to the Council. Negotiation also indicated that some countries were anxious to have the ad hoc committee's report summarize the facts about restrictive business practices in international trade and governmental measures concerning them, as well as set forth proposals for action. Accordingly, the resolution was modified to provide for a factual report. In the Council debate on the resolution, the only expressions of hostility came from the three countries of the Soviet bloc, whose representatives argued that the proponents of the resolution were hypocritical and that the purpose of the United States was to enable American business, already monopolistic, to acquire a broader control of overseas markets. The resolution was adopted by a vote of 13 to 3, with Mexico and Chile abstaining.

In its final form, the central principle of the resolution consisted of a recommendation to states members of the United Nations

"that they take appropriate measures, and cooperate with each other, to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade, on the economic development of underdeveloped areas, or on standards of living; . . ."
and

"...that the measures adopted in the cases and for the purposes stated in the preceding paragraph shall be based on the principles set forth in Chapter V of the Havana Charter, concerning restrictive business practices; . . ."²¹

A committee of ten countries was set up to develop the factual

²¹ U.N. Doc. E/2133, adopted September 13, 1951.

report and the proposals for methods of action. It included Belgium, Canada, France, India, Mexico, Pakistan, Sweden, the United Kingdom, the United States, and Uruguay. The representatives of these countries, however, were not empowered to bind their governments, but were understood to be working on an *ad referendum* basis as experts developing proposals for consideration by their own governments as well as by countries not represented on the committee.

After sessions in New York and Geneva, the committee submitted its report early in 1953.²² At the meeting of the Economic and Social Council in Geneva in July, 1953, the report was briefly considered and referred to governments members of the United Nations, as well as various specialized agencies and intergovernmental and nongovernmental organizations, for consideration and comment. The Council instructed the Secretary-General to submit his report on the proper place for the work when comments had been received from sufficient number of governments to indicate attitudes toward the report. The Council also decided to resume consideration of the matter not later than the session scheduled early in 1955.

In submitting its report, the committee set forth three propositions, which, in its opinion, underlay the resolution creating it and had been confirmed by its work. These were:

"1. that opinions differ from country to country about restrictive business practices and about governmental policies towards them;

"2. that restrictive business practices affecting international trade may in some circumstances have harmful effects on the fulfilment of widely acceptable objectives of international economic policy;

"3. that it may be difficult in such cases for appropriate action to be undertaken solely by governments acting individually."²³

The committee found these propositions to constitute "the solid core of agreement in a widely varied picture," and recorded its belief "that the principles of Chapter V of the Havana Charter continue to represent the widest area of agreement which can at present be achieved on this difficult subject."²⁴ In accord with this belief and the Council's instruction to base its work upon the Havana charter, the committee submitted draft articles of agreement which

²² "Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council," U.N. Doc. E/2380, E/AC 37/3, March 30, 1953.

²³ "Restrictive Business Practices, Analysis of Governmental Measures Relating to Restrictive Business Practices," U. N. Doc. E/2379, E/AC 37/2, March 30, 1953, p. i.

²⁴ *Ibid*, pp. i-ii.

were modeled closely upon the relevant portions of the charter. It explained that the changes and amplifications which it had made were, with one exception, based upon the necessity of drafting the agreement so that it could stand alone instead of as a portion of a larger undertaking. The sole exception was a definition of a restrictive business practice relating to the application of technology, the scope of which had been somewhat enlarged.²⁵

Like the Havana charter, the committee's proposals begin with a broad pledge that members will cooperate to prevent restrictive business practices affecting international trade when such practices have harmful effects on the expansion of production or trade in the light of various broad objectives. A list of practices is included, identical with that of the Havana charter except that the scope of the practice having to do with the restriction of technology has been enlarged, as indicated above. As in the Havana charter, the listed practices may give rise to general studies and may become the subject of informal intergovernmental consultations. As in the Havana charter, they are also to be subject to investigation upon complaint if they are engaged in by public or private commercial enterprises which possess effective control of trade among a number of countries in one or more products. The investigative process is conceived as one in which an international body asks participating governments to supply information, which they will severally ob-

²⁵ Several members of the committee regarded the definition in the Havana charter as unduly narrow, since that definition had to do only with agreements and, unlike the other provisions of the Havana charter, ignored monopolistic and coercive practices on the part of a single business enterprise. The committee tried to cover such practices without impairing the discretionary control of technology by its owner. The committee's version defines as a restrictive business practice "preventing by agreement or coercion the development or application of technology or invention whether patented or unpatented, or withholding the application of such technology with the result of monopolizing an industrial or commercial field." This language was understood to subject to investigation only practices which were regarded in the United States as violations of the Sherman Act. In discussing the change, the committee's report says:

"... It will be noted that this provision does not bring within the definition of restrictive business practices the withholding of technology as such. In the Committee's opinion, a decision by a single commercial enterprise to refrain from the development and commercial application of some technological method does not, in itself, call for investigation and could not be readily investigated. There are, however, unusual cases in which one enterprise imposes its will on another, or in which the control over technology (patented or unpatented) is so far-reaching that a restrictive exercise thereof may create or extend a monopoly of a whole branch of trade. It is only in these cases that the Committee believes that the technological policy of a single enterprise may give rise to complaints which can usefully be investigated in the manner contemplated in the draft agreement." See "Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council," U. N. Doc. E/2380, E/AC 37/3, March 30, 1953, pp. 17-18 and Annex II, p. 3.

tain through their own governmental processes; an international staff analyzes the information and submits a factual report; the representatives of the participating governments determine whether or not the facts justify a finding that there are the harmful effects specified in the agreement, and may also, at their discretion, make recommendations concerning the matter; and participating governments are then obligated to take action, by their own governmental processes, to prevent such harmful effects. Provision is made for a final public report of the situation found and the remedial action taken.

In the development of such a program, care must be taken to provide for effective cooperation, yet to maintain due respect for national sovereignty and for the many differences between countries in economic conditions, laws, and governmental practices. The draft agreement seeks this objective by entrusting to the member states all direct relations with the business enterprises under their jurisdiction. Member states alone are to obtain facts and take remedial action. The international body is given no inquisitorial power and no authority other than to report and to recommend. To make this loose structure capable of effective action, there is provision that members will accept not only the broad obligation to prevent restrictive business practices that have harmful effects but also specific obligations to obtain and furnish information, to consider carefully the findings and recommendations of the international body, and to report fully the action they take or the reasons for inaction. Moreover, members are to undertake to carry out their basic obligations through all possible measures, by legislation or otherwise, in accord with their constitutions or systems of law and economic organization. In many countries, unlike the United States, the acceptance of such obligations would require substantial legislation to give the government adequate investigatory and remedial powers. Indeed, it is noteworthy that, after the drafting of similar provisions in the Havana charter, several European countries adopted or began to develop drafts of domestic laws avowedly intended to enable these governments to carry out their obligations under the charter. An outstanding example is the British Monopolies and Restrictive Practices Act, which became law in 1948.

A major problem in the establishment of an international body such as has been proposed by the committee is the division of functions between governmental representatives and the international staff. Whereas the restrictive practices chapter of the Havana charter did not explore this problem in detail, because the chapter was part of a much larger project, the committee's draft agreement was necessarily concerned with it. The considerations

upon which the committee's proposals were based were these:

"(a) The factual materials needed as a basis for a sound conclusion on the question whether a restrictive business practice has harmful effects (within the meaning of the draft agreement) should be compiled and set out in a spirit of independence and impartiality by persons with experience and knowledge of the issues; and advice by such persons might be useful at a later stage.

"(b) The arrangements should reflect the fact that vital trading and economic interests of governments might be involved in the decisions of the agency and should therefore include provision for adequate control by the representatives of governments."²⁶

The committee recorded its belief that no country would be likely to regard the proposals as entirely satisfactory, but indicated that what had emerged from full discussions by representatives of ten countries with varied problems and interests might be indicative of the lines on which it is possible to resolve different national conceptions.

A central substantive difficulty in the international treatment of restrictive business practices is the fact that the relative scope of public and private action varies from country to country. Activities which are wholly private in one country may be publicly authorized or regulated in a second country and may be carried on by the government in a third country. Moreover, governmental activities are by no means always free from restrictive aspects. In the Havana charter, which dealt at length with governmental controls over trade, the effort to prevent restrictive business practices stood in a setting of efforts to prevent related governmental restrictions. In the committee's draft proposals, however, business practices alone were under consideration. This limitation of scope necessarily raised question as to what should be done about business practices which were authorized by governments and as to what should be done about restrictions which were required or directly undertaken by governments. The committee concluded that the sovereign acts of governments, as distinguished from the conduct of public or private commercial enterprises, lay outside the scope of the draft agreement and could not, in any case, be effectively curbed by the procedures of investigation and report which were contemplated in the draft agreement. Where governments took full responsibility for restrictive acts, investigation of these acts by an international body, followed by formal findings, was not regarded as appropriate. Instead, the committee provided that the international body might, in such cases, bring to the attention of particular governments the

²⁶ "Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council," U. N. Doc. E/2380, E/AC 37/3, March 30, 1953, p. 21.

bearing of their policies upon the operation of the agreement. Members of the committee also had in mind the fact that the relation of governmental policies to business practices would necessarily be considered in determining whether the work upon restrictive business practices should be placed in the United Nations, in the General Agreement on Tariffs and Trade, or elsewhere.

The committee was also confronted with the probability that in certain cases a particular restrictive business practice might be simultaneously forbidden, tolerated, approved, and required in different countries. To exempt a practice from examination because it was required by one country was felt to be excessive in view of the possibility that it might be condemned by most of the world. The committee envisaged varying situations, ranging from one in which a practice was required by a country which played no significant part in the relevant international trade to an opposite extreme in which the practice was required by countries representing nearly all of the relevant trade. Accordingly, the committee included in the draft agreement a flexible provision to the effect that where a practice existed in more than one country and was not specifically required in all countries in which it was found it might be investigated at the discretion of the international body.

In considering the status of practices that are approved but not required by governments, the committee was impressed by the many gradations of approval which might have to be considered if a special status were given to such practices. Furthermore, the committee envisaged the danger that if any such special status were created great pressure would be put upon weak governments to grant approval to the practices of powerful business enterprises. Accordingly, the committee agreed to recommend that no special status be given to approved practices as distinguished from practices that were specifically required. It contemplated, however, that approval by governments and the reasons for such approval would be among the relevant facts which would normally be ascertained and evaluated in determining whether or not a given practice had harmful effects.

The most substantial difference between the committee's proposals and the policies of the American antitrust laws lies in the fact that the draft agreement condemns restrictive business practices only where they are shown to have certain harmful effects. In this respect, the agreement follows the principle of the Havana charter and differs from the principle of the antitrust laws, which condemn conspiracies to restrain trade and monopolies because of their anticompetitive effect, without requiring an evaluation of the bearing of such arrangements upon ultimate social objectives. In

evident that few countries outside the United States were willing the negotiations which evolved the Havana charter, it had become to condemn business practices on the sole ground that they impaired or destroyed competition. In countries with social-democratic governments, the principle of competition was suspect although private monopoly was condemned. In various other countries, particularly in Europe, there was a belief that particular cartels and monopolies might operate moderately in the public interest and that no presumption should be established against them in advance of an examination of the facts in each instance. The same attitudes were apparent in the debate in the Economic and Social Council in 1951 and in the deliberations of the *ad hoc* committee. Thus it was obvious that whereas governments might be able to agree that particular monopolistic arrangements were harmful and should be eliminated, they would not be able to agree in advance that a competitive standard should be established. Both in the development of the Havana charter and in the formulation of the committee's report, the representatives of the United States accepted the test of harmful effect in the expectation that it would make possible a useful cooperative attack upon the worst monopoly practices and would afford to governments without experience in the investigation of monopolistic practices the basis for development of a public policy which might in time broaden the area of agreement and coordinated action.

In the immediate future, the committee's report will be considered by the governments of the United Nations, including the United States Government. Presumably, it will be among the matters brought before the committee recently established by the President to evaluate foreign economic policy. Questions which will necessarily confront the committee are:

1. Shall the United States continue its leadership in seeking to bring about the elimination of monopolistic practices in international trade and in overseas markets through multilateral and bilateral understandings with other governments?

2. If so, does the committee's report afford a useful basis for a beginning of multilateral action; and if the committee's report should be found unacceptable, can an alternative be developed which affords equal or better chance that national policies designed to eliminate such practices will be reinforced by international cooperative action?